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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1328

ROY D. KEEHN, AS RECEIVER OF CENTRAL MUTUAL INSURANCE COMPANY OF CHICAGO, AN ILLINOIS CORPORATION,
Petitioner,

vs.

BRADY TRANSFER & STORAGE COMPANY, AN IOWA CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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vs.

BRADY TRANSFER & STORAGE COMPANY, AN IOWA CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 159 F. (2d) 383. The opinion of the United States District Court for the Northern District of Illinois, which was reversed by the Circuit Court, is reported in 64 F. Supp. 392.

JURISDICTION.

Petitioner has invoked the jurisdiction of this court under Section 240 of the Judicial Code of the United States (Title 28 U. S. C. A., Sec. 347) and Rule 38 of the Rules of this court.

In support of jurisdiction, petitioner has asserted the following grounds:

(1) The decision is in conflict with two decisions of the United States Circuit Court of Appeals for the Fourth Circuit on the same matter.

(Respondent denies that there is any such conflict, or that the decisions of that court involved the same matter as the decision in the present case.)

(2) An important question of local law has been decided in a way probably in conflict with applicable local decisions.

(Respondent denies that the decision of the circuit court is in conflict with the applicable local decisions of the Supreme Court of Iowa.)

(3) The decision departs so far from the accepted and usual course of judicial proceeding as to call for an exercise of this court's power of supervision.

(Respondent denies that there was anything unusual about the proceeding or decision in this case, and asserts that the decision conforms to the authorities.)

(4) It involves an impairment of the obligation of contract contrary to Article I, Section 10, of the Constitution of the United States.

(Respondent denies that any contract has been impaired,

since the provision in question was invalid when made. Further no such issue of constitutionality was raised either in pleading or argument in this case in circuit court or district court below.)

(5) It involves a deprivation of property without due process of law contrary to Article XIV, Section 1 of the Amendments to the Constitution of the United States.

(Respondent denies that petitioner has been deprived of any property without due process of law. Further no such issue of constitutionality has been pleaded or argued in this case in circuit court or district court below.)

STATEMENT OF THE CASE.

Petitioner's statement of facts contains certain inaccuracies and omissions. Without duplicating all of that statement, respondent submits the following statement of the case:

Petitioner is receiver of a mutual insurance company organized under the law of Illinois, Central Mutual Insurance Company of Chicago (R. pp. 3-9). Respondent is an Iowa corporation, with its principal place of business in Fort Dodge, Iowa, and is engaged in the carriage of freight for hire in Iowa, and in interstate operations in Illinois and elsewhere (R. pp. 27, 32). The policy in question, being a policy of liability insurance insuring respondent in its trucking operations, was issued by Central Mutual through its agent and branch office manager at Des Moines, Iowa, and delivered to respondent at Fort Dodge, Iowa, on September 7, 1935 (R. pp. 6, 12, 27, 32). It was cancelled by mutual agreement on August 16, 1936 (R. pp. 28, 32). Central Mutual went into receivership on January 11, 1937 (R. p. 39).

On July 1, 1940, the Circuit Court of Cook County, Illinois, having jurisdiction of the receivership proceedings, ordered an assessment to be levied against all former policyholders, including respondent, in the amount of 100 per cent of the cash premiums paid on their policies (R. p. 41). Respondent was not a party to these proceedings (R. pp. 26, 32). Demand was made for payment and refused, and the receiver commenced action in the Circuit Court for Cook County to collect the amount of the assessment, $10,096.89 (R. p. 3), respondent being subject to suit in Illinois by reason of its trucking operations there. The

cause was thereafter timely removed to the District Court of the United States for the Northern District of Illinois, Eastern Division, for diversity of citizenship (R. p. 9).

Thereafter respondent filed its amended and substituted answer (R. p. 10) and petitioner moved for summary judgment, supporting its motion by the affidavit of the receiver (R. p. 34). Respondent filed a resistance (R. p. 58), and the matter came on for trial in the district court, which sustained the motion and on March 13, 1946, entered judgment against respondent for $9,280.73, with interest at 5 per cent from July 20, 1940 (R. pp. 61-73). On appeal this judgment was reversed by the Circuit Court of Appeals for the Seventh Circuit, which remanded the case to the district court with directions to proceed in accordance with the views expressed in the opinion (R. pp. 89-101).

The point at issue, therefore, was the sustaining of petitioner's motion for summary judgment in the district court. The ground of this motion, as stated in the affidavit of the receiver attached thereto, was as follows (R. p. 49):

> "None of the things set up in the amended and substituted answer constitute a defense for the following reasons:
>
> 1. It appears affirmatively from the record that some of the allegations of the answer are not in accord with the facts.
>
> 2. The remainder of the things set up do not constitute defenses and do not have the legal effect contended by defendant."

The amended and substituted answer set up some nine separate defenses. The district court reviewed these and concluded that none of them stated a good defense to the action (R. p. 61). When defendant (respondent) appealed to the circuit court, it elected to rely only on the Third and Fourth Separate Defenses pleaded in its answer (R. p. 90).

Petitioner incorrectly describes the grounds of the Third Separate Defense in his Statement at page 4. This defense contained some allegations of fraud on the part of Central Mutual in obtaining its license to transact business in Iowa, but the principal ground of the defense, and the one relied on in the circuit court, was that the policy in question was not a valid assessable policy because it was written in Iowa by Central Mutual at a time when it was insolvent and not possessed of the surplus and reserves required of foreign mutual companies as a condition to transacting insurance business within the State of Iowa by Section 8955 and 8956 of the Code of Iowa, 1935 (R. p. 13). The motion for summary judgment did not deny the insolvency so alleged, but merely asserted that these facts even if true did not constitute a defense to the action.

The Fourth Separate Defense alleged that the assessment provisions of the policy in question were void because the policy was issued within the State of Iowa without any application therefor stating the maximum contingent premium for which insured was liable, as required by Section 8909 of the Code of Iowa, 1935 (R. p. 17). It was admitted that no application was ever taken for this policy of insurance (R. pp. 29-30, 32).

The policy in question provided (R. p. 38):

> "The contingent liability of the assured hereunder is limited to one time the premium named herein and no more. The assured is given and hereby accepts notice that by virtue of this policy he is a member of the Central Mutual Insurance Company of Chicago * * *."

There was no other provision in the policy of insurance with reference to the liability of the insured to an assessment.

The respondent was not, as stated by petitioner in his

Statement at page 2, "admittedly" a member of the company. Respondent has never admitted that it became a member of the company as a result of its transaction with Central Mutual.

Central Mutual was licensed by the Commissioner of Insurance to transact business in Iowa on September 20, 1932, and this license was revoked by the Commissioner on December 31, 1936 (R. pp. 30, 32).

ARGUMENT.

I.

The decision of the circuit court of appeals is not in conflict with the decisions of the Fourth Circuit Court of Appeals cited by petitioner and in any event such conflict would arise out of the local law and not constitute ground for certiorari.

Petitioner alleges that there is "headon" conflict between the decision of the circuit court in this case and the decisions of the Fourth Circuit in *Miller* v. *Barnwell Bros.*, 137 F. (2d) 257, and *Keehn* v. *Parrish Dray Line*, 145 F. (2d) 646. Both of these cases were brought by the receiver of Central Mutual against a policy holder to collect the assessment. The Barnwell Bros. case arose in North Carolina. Defendant pleaded fraud based upon a promise made by the president of Central Mutual to provide a Lloyd's of London policy to insure defendant against assessment liability. It was held that this promise was not made with intent to deceive and further that defendant had not repudiated the contract upon failure to receive the Lloyd's policy. Defendant further pleaded that the policy was unenforceable because Central Mutual was not qualified to do business in North Carolina. It was held that there was nothing to show that the policy was not lawfully issued and in effect under the laws of states other than North Carolina, and that Central Mutual obtained a license to transact business there before the policy was filed in that state.

In sustaining the Third Separate Defense in the present case, the circuit court of appeals held that a policy written

by a foreign mutual company in the State of Iowa while such company was insolvent and therefore in violation of Section 8955 of the Code of Iowa, 1935, was invalid and unenforceable. While this defense also pleaded fraud, in the circuit court respondent relied only upon the violation of the statute which was also pleaded therein. Petitioner has persisted in arguing this matter as though nothing more than fraud were involved, although the circuit court pointed out (R. p. 95):

> "The defense here is not predicated upon a fraud perpetrated upon the Commissioner of Insurance but upon the alleged fact that the policy was issued in violation of the Iowa statute designed for the protection of the defendant (and other policyholders) and that as a result the policy was void from its inception as to the company or any rights it might have thereunder."

Obviously the Barnwell Bros. case is not in conflict with the decision in the present case.

In the Parrish Dray Line case (145 F. (2d) 646), defendant pleaded that the policy provision that the contingent liability of assured was limited to one time the premium named therein was not a sufficient statement of the maximum premium payable by insured to comply with Section 8097 of the South Carolina Code, which required the maximum premium payable to be expressed in the policy *or* in the application for the insurance. The Fourth Circuit Court of Appeals held the provision sufficient.

In the present case, in sustaining the Fourth Separate Defense, the circuit court held that failure to provide an application for the policy stating the maximum contingent liability of the insured, contrary to the requirement of Section 8909 of the Code of Iowa, 1935, that the maximum premium payable, including contingent liability be expressly stated both in policy *and* in the application for the

insurance, rendered the assessment provisions of the policy unenforceable.

Plainly there is no conflict between the Parrish Dray Line case and the decision of the circuit court in this case. Both of the Fourth Circuit cases involved different issues and statutes of different states than the present case.

If there were any conflict between those decisions of the Fourth Circuit and the present case, such conflict would still not constitute a proper ground for certiorari, since such conflict would arise out of interpretation of differing local laws. The Circuit Court of Appeals for the Seventh Circuit in the present case was attempting to ascertain and apply the statutes and decisions of Iowa to a case which was governed by the law of Iowa. Petitioner never attempted to contest respondent's assertion made in pleading and in argument that the law of Iowa controlled as to the validity of the policy sued upon. The circuit court stated (R. p. 92):

> "The parties concede that the question must be decided in accordance with the law of the State of Iowa, and they also agree that there is no adjudicated case in that state exactly in point, although both cite cases from that state which it is claimed by analogy and reasoning support their respective contentions."

It is respondent's understanding that since the decision of this court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, the federal courts are to be deemed governed as to all non-federal issues by the decisions of the appropriate state courts, as well as by local state statutes. Since that decision, this court will not grant certiorari to review conflicting circuit court decisions if the conflict is attributable to a difference in local law. In *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 205, this court said:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for

granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."

That the local law of Iowa as determined and applied by the Seventh Circuit Court of Appeals may differ from the local law of North and South Carolina as applied by the Fourth Circuit Court of Appeals, even in cases involving the same receiver as plaintiff and policy holders of the same mutual company as defendants, is not a sufficient ground for certiorari.

The purpose of petitioner's citation of the cases of *Woodmen of the World* v. *Bolin*, 305 U. S. 66, and *Broderick* v. *Rosner*, 294 U. S. 629, at pages 13-16 of his Brief, is not apparent to respondent. Both cases involve the application of the full faith and credit clause, Article IV, Section 1, of the Constitution. The full faith and credit clause has never been raised in pleading or argument in this case in the courts below, and it is not included among the grounds which petitioner specifies in his petition for writ of certiorari. The first of these cases holds that a state other than that in which a fraternal organization is incorporated cannot attach to the certificate of membership rights against the society which are refused by the law of the domicile. The second case holds that New Jersey cannot by statute prohibit its courts from entertaining actions to enforce the statutory liability of stockholders of banks created by the laws of any other state.

Petitioner now asks at page 17 of his Brief whether Iowa law or Illinois law is to govern. However, he has never, before filing this petition, attempted to dispute the controlling effect of the Iowa law in this case. Respondent pleaded in its answer that the contract of insurance was entered into in Iowa and that its validity and construction must be determined by the laws of that state (R. pp. 13-14).

In the motion for summary judgment, petitioner questioned the construction of the Iowa law, but he did not deny that it was applicable (R. p. 49). In the circuit court, respondent devoted a portion of its brief and argument to the proposition that the Iowa law governed. Petitioner did not contest the issue. Under the circumstances, the circuit court stated in its opinion (R. p. 92):

> "The parties concede that the question must be dealt with in accordance with the law of the State of Iowa."

Petitioner has waited too long to take issue on the question of the controlling force of the Iowa law in this case, and he is now irrevocably bound to the proposition that the decisions and statutes of Iowa must govern as to the validity of the policy in suit.

In any event, respondent does not understand that the decisions of this court permit of any other view than that the statutes and law of the state where the contract was entered into must be paramount in such a case as this one. In *John Hancock Mutual Life Insurance Company* v. *Yates*, 299 U. S. 178, this court held that the full faith and credit clause required the courts of Georgia to apply the statutes of New York to determine the effect of the attachment to the policy of a copy of the application for the insurance, where the policy was issued and delivered in New York. And in *Pink* v. *A. A. A. Highway Express, Inc.*, 314 U. S. 201, this court affirmed where the Georgia court applied the law of Georgia, where the policy was delivered, to determine whether the receiver of a mutual insurance company could recover an assessment against a policyholder. Chief Justice Stone, speaking for the court, said at page 211:

> "The interpretation and legal effect of policies of insurance entered into by the inhabitants of Georgia, who are sued upon them in its courts, are peculiarly matters of local concern. Were it not for the New York

statute, there could be no question of Georgia's authority to adjudicate the rights and obligations arising under the policies. And as we have seen, the only basis for the imposition by New York of its command on the Georgia court and policyholders is the assumption by the latter of membership in the New York company. But this, in the circumstances of this case, depends upon the meaning and effect of all the provisions appearing on the policies with respect to the assumption of membership, which is for Georgia to determine."

The State of Iowa has a legitimate interest in protecting the interests of its citizens acquiring policies of insurance in Iowa. *Osborn* v. *Ozlin,* 310 U. S. 62. This interest extends to a proper concern for the financial soundness of companies writing insurance contracts with its citizens. *State Farm Mutual Auto Insurance Co.* v. *Duel,* 324 U. S. 154. Even had petitioner properly raised the point, no other conclusion would have been possible than that the statutes and decisions of Iowa were controlling as to the validity of the policy of insurance in this case.

II.

The decision of the circuit court of appeals is not in conflict with applicable local decisions of the courts of Iowa in holding that the Third Separate Defense states a good defense to the action.

The Third Separate Defense is not based upon fraudulent misrepresentations made to the Commissioner of Insurance of the State of Iowa, as petitioner states. As the circuit court pointed out, the chief ground of the Third Separate Defense was the claim that the policy in question was invalid because written by Central Mutual at a time when it was insolvent, in violation of the provisions of Sections 8955 and 8956 of the Code of Iowa.

The circuit court of appeals in its opinion in this case considered the provisions of the Iowa statutes and the cases of the Supreme Court of Iowa relied upon by petitioner, as well as those cited by respondent in support of its position. The court considered and discussed the case of *Sherman* v. *Frasier,* 112 Iowa 236, 83 N. W. 886, and the case of *Corey* v. *Sherman,* 96 Iowa 116, 64 N. W. 828, upon which petitioner relies here as expressing the law of the State of Iowa. Both of these cases involved the defense of fraud practiced upon members of a mutual insurance company organized in Iowa. In the present case it is not the *fraud* that respondent is relying on but the *statutory violation* that occurred when the policy of insurance was written while Central Mutual was insolvent. These cases are, therefore, not in point and do not even suggest any rule which is applicable to the defense raised in the present case.

Respondent recognized that the proposition involved in its Third Separate Defense had not been before the courts of Iowa in any case exactly in point, and supported its argument by the citation of two decisions of the Supreme Court of Iowa which it believed pointed the way to the holding which it asked the circuit court to make. The first of these cases was *Seamans* v. *Zimmerman,* 91 Iowa 363, 59 N. W. 290, where action was brought by the receiver of an insolvent foreign mutual insurance company to recover an assessment. One of the grounds of defense was that the company had failed to comply with the Iowa statute regarding its financial condition, being a predecessor statute to Section 8955 of the Code of 1935. The Supreme Court of Iowa sustained this defense saying:

> "The power of the legislature of a state to make contracts like those under consideration void is not questioned. * * * To hold that the company may recover the assessments would be a evident violation of the spirit and intention of the statute."

The second Iowa case relied on by respondent was *Parker* v. *Lamb and Sons,* 99 Iowa 265, 68 N. W. 686, where suit was brought by the receiver of a mutual fire insurance company of Chicago to recover assessments on a policy of insurance on property within the State of Iowa. One of the defenses was that the policy was issued in violation of statutes of Iowa prescribing the financial condition of companies authorized to transact business there. The court said at page 273:

> "The contract of insurance, so far as the right of the company to insure property in this state is concerned, was void. By Section 1707 of McClain's Code it was absolutely prohibited from directly or indirectly taking any risk or transacting any business of insurance in this state unless possessed of $200,000 of actual paid up capital and complying with other conditions named in said section."

Outside the state of Iowa there are only two cases in point upon this proposition known to respondent. They are *Swing* v. *Red River Lumber Company,* (Minn.) 117 N. W. 442, and *Keehn* v. *Hodge Drive-It-Yourself, Inc.,* (C. C. A. Ohio, Hamilton County) 53 N. E. (2d) 69. The latter case involves the same plaintiff-receiver as does the instant case. Both of these decisions sustain the position of the respondent and even the district court in the present case, although it refused to follow them, recognized that they "hold squarely that even though an insurance company has formally qualified to do business in a state its pre-existing insolvency may be asserted by a policyholder to resist assessment liability".

The circuit court of appeals in this case did not disregard the law of the State of Iowa but attempted to ascertain what that law was and to apply it, utilizing such pertinent reasoning as the Iowa court has employed. Far from being in conflict with the local decisions, it is in strict accord

with them. There is no line of authority upon the exact proposition involved and for which respondent contended which announces any different result than that arrived at by the circuit court of appeals.

This court has said that jurisdiction to bring cases up by certiorari from the circuit court of appeals was not conferred upon it "merely to give the defeated party in the circuit of appeals another hearing". *Magnum Importing Company* v. *Coty*, 262 U. S. 159, 163. The decision of the circuit court of appeals does not conflict with the Iowa decisions because there are none which are precisely in point on this proposition. And since the decision follows the only cases from outside the state of Iowa which have decided the question, it can not be said that it is in conflict with the law as it would probably be announced by the Supreme Court of that state if such a case should come before it. The attitude of this court toward the granting of certiorari in such circumstances was expressed as follows by Mr. Justice Reed in *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 206, where it was determined that the local law of Pennsylvania governed the construction of a life insurance policy delivered in that state, and there was no decision by the Supreme Court of Pennsylvania upon the point in issue:

> "The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition. Nor was it contended that the decision below was 'probably untenable' and therefore probably in conflict with the state law as yet unannounced by the highest court of the State. No decision at the present time could reconcile any 'conflict of circuits', or do more than enunciate a tentative rule to guide particular federal courts. Therefore, even as-

suming that it is adequately presented on the record, we decline to decide the issue of state law."

The decision of the circuit court does not conflict with the applicable Iowa decisions because there are none precisely in point. It does not conflict with what the law of Iowa would probably be announced to be by the Supreme Court of Iowa because it conforms to the decisions of that court which are nearest in point, and follows the only decisions from outside the state which are actually in point upon the proposition at issue. This ground of the petition for certiorari is likewise untenable.

III.

The decision of the circuit court of appeals is not in conflict with applicable local decisions, in holding that the Fourth Separate Defense stated a good defense to the action.

The Fourth Separate Defense alleged that the policy in question was nonassessable because there was no application for the insurance which stated the maximum liability, including contingent liability, of the insured, as required by Section 8909 of the Code of Iowa, 1935 (R. p. 17).

Petitioner does not appear in Division III of his Brief to dispute the controlling effect of the Iowa statute, which the circuit court stated he had conceded, but he merely repeats the arguments made in that court as to the proper construction of the Iowa statutes. The circuit court considered these arguments in its decision in this case, but was not persuaded by them.

There are no decisions of the Supreme Court of Iowa construing Section 8909. The decisions of the Iowa court passing on Sections 8974 and 8975, referred to on Page 24 of Petitioner's Brief, have nothing to do with Section 8909,

and merely hold that Sections 8974 and 8975 apply to all kinds of insurance and all kinds of insurance companies, mutual and otherwise, so that no statement in the application can be taken advantage of by the company unless a copy of the application is attached to the policy. *Cook* v. *Federal Life Assn.*, 74 Iowa 746, 35 N. W. 500; *Grimes* v. *Northwestern Legion of Honor*, 97 Iowa 315, 64 N. W. 806; *Corson* v. *Iowa Mutual Fire Ins. Assn.*, 115 Iowa 485, 88 N. W. 1086.

Since there are no applicable decisions of the Supreme Court of Iowa, the circuit court decision certainly could not be said to conflict with the local law. The circuit court construed the statute in question according to its plain language and intent, and there is nothing to indicate that its conclusion was not a correct one.

The force of the holding of the Supreme Judicial Court of Maine in *Pink* v. *Town Taxi Co., Inc.*, (Maine) 21 A. (2d) 656, referred to by Petitioner on Page 24 of his Brief, must depend on the statutes of Maine. Presumably the case holds that under the statutes of that state a policyholder in a mutual company may be liable to assessment even though the policy does not provide that it is assessable. In Pennsylvania, it appears to be held that policies of a mutual company are assessable even when they expressly state that they are nonassessable. *Commonwealth* v. *Keystone Indemnity Exchange*, (Pa.) 6 A. (2d) 821. Also in Maryland. *Taggart* v. *Wachter*, (Md.) 21 A. (2d) 141. But this cannot be the law in Iowa, where Section 8909 of the Code requires that the maximum premium, including contingent premium, be expressly stated in the policy and in the application for insurance, and where under Section 8955 a properly qualified mutual company can issue a policy which is nonassessable by its terms. Where statute requires assessment liability to be stated in the policy, absence of such provision renders

the policy nonassessable. *Pink* v. *A. A. A. Highway Express, Inc.,* (Ga.) 15 S. E. (2d) 337, affirmed 314 U. S. 201; *Pink* v. *Georgia Stages,* (D. C., M. D. Ga.) 35 F. Supp. 437; *Keehn* v. *Parrish Dray Line,* (D. C., E. D. S. C.) 53 F. Supp. 855.

The circuit court considered that, under the Iowa statute, failure to provide for assessment liability in the application for the insurance led to the same result as failure to provide therefor in the policy of insurance. There are no authorities in point on the question either in Iowa or elsewhere, but the circuit court's decision is consonant with those cases from outside of Iowa which have dealt with a failure to comply with a statutory requirement that liability to assessment be expressly stated in the policy. There is no reason to doubt that this is also the law in Iowa.

It is not true that the decision of the circuit court is in conflict with the applicable local law of Iowa. It ascertains and applies such law. There is no basis for certiorari on this ground.

IV.

The decision of the circuit court does not depart from the accepted and usual course of judicial proceeding.

Petitioner asserts in his petition that the decision departs so far from the accepted and usual course of judicial proceeding as to call for an exercise of this court's power of supervision. He does not, however, argue this ground of the petition in his brief, so that respondent assumes that this ground has been waived. In any event, respondent is at a loss to perceive any basis for this ground of the petition in the present proceedings.

The course of this litigation shows that after respond-

ent filed its amended and substituted answer in the district court, petitioner moved for summary judgment on the ground, that the answer stated no defense. The trial court sustained the motion and entered judgment. Respondent appealed to the circuit court on the ground that the Third and Fourth Separate Defenses constituted good defenses to the action, and the circuit court upheld the appellant and reversed. Its decision accorded with its construction of the statutes of Iowa, which both parties conceded should control, and with the only decided cases which could be found which were in point upon the propositions involved. There has not been the slightest departure from the accepted or usual course of judicial proceedings in this litigation.

V.

The decision involves no impairment of the obligation of contract contrary to Article I, Section 10 of the Constitution, and no constitutional question has previously been raised in this case in the courts below.

Petitioner does not argue this ground of the petition in his brief. Even if it has not been waived, it is obviously untenable. This provision of the constitution refers to existing contracts impaired as to their obligation by subsequently enacted legislation. It is not concerned where the statutes which render a contract invalid and unenforceable are in existence at the time the contract is entered into. The provisions of the Iowa statutes relied upon by respondent in its Third and Fourth Separate Defenses were all in force long before Central Mutual sold, issued and delivered this policy on September 7, 1935.

Furthermore, petitioner raised no constitutional questions in his motion for summary judgment in the district

court, and no such questions have been argued either in the district or circuit courts in this case. Under the rules of this court, it is only where a question of federal law has been *decided* by a circuit court that this court may grant certiorari for the purpose of settling the question (Rule 38 (5, b)). The circuit court in this case has decided no such question, because it was never raised or presented to it, and it cannot be newly raised in this court for the first time.

VI.

The decision does not deprive petitioner of any property without due process of law, and no such constitutional question has previously been raised in this case in the courts below.

Since petitioner does not argue this ground of his petition, respondent does not know in what respect he may believe he has been deprived of his property without due process. If the leisurely prosecution of this case through state, federal, district and circuit court over a period of six years does not constitute due process, it will certainly never be achieved in this imperfect world. No such constitutional question was presented in petitioner's motion for summary judgment or argued or raised in either district or circuit court below at any point in the proceedings. It is utterly without merit as a ground for certiorari in this case.

Conclusion.

This case presents no ground for certiorari by this court. The decision of the circuit court does not conflict with decisions from other circuits, but if it did, such conflict would be permissible since the decision undertakes to as-

certain and apply the local law of Iowa to a transaction which it has been conceded is governed by such law, while decisions from other circuits involve the local law of other states. The decision does not conflict with the applicable local law of Iowa. It applies Iowa statutes in accordance with the implications of Iowa decisions and the analogous holdings of courts from other states with respect to similar statutes. There are no Iowa cases in point.

The constitutional grounds presented by the petition for writ of certiorari are not argued in the brief. They have no merit in any event. Furthermore, they were not raised, argued or decided in either of the courts below at any point in these proceedings.

Of course, the answer to the fancied evils to which petitioner points in his conclusion as likely to result if this decision stands is for the mutual companies in question to comply with the laws of those states where they engage in business. Such laws are enacted for the protection of the policyholders of such companies in those states and there is no reason why they should not receive the full measure of the benefit of such protection. That was the holding of the circuit court in this case.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Sections of Iowa Statute (Code of 1935).

8909. *Maximum Premiums.* The maximum premium ayable by any member of a mutual company shall be xpressed in the policy and in the application for the ısurance. Such maximum may be a cash premium and n additional contingent premium not less than the cash remium, or may be solely a cash premium, which premium ıay be made payable in installments or regular assess- ıents. No policy shall be issued for a cash premium ithout an additional contingent premium unless the ›mpany has a surplus which is not less in amount than ıe capital stock required, at the time of the organization f such mutual insurance company, of domestic stock ısurance companies writing the same kind of insurance; ut said surplus shall not be less than one hundred ıousand dollars.

8955. *Foreign Mutual Companies—Surplus.* Any utual insurance company organized outside of this state ıd authorized to transact the business of insurance on ıe mutual plan in any other state of the United States · in the District of Columbia, may be admitted to this ate and authorized to transact herein any of the kinds ' insurance authorized by its charter or articles of in- ›rporation, when so permitted by the provisions of this ıapter, with the powers and privileges and subject to ıe conditions and limitations specified in said chapter; ·ovided, however, such company has complied with all ıe statutory provisions which require stock companies) file papers and to furnish information and to submit to :amination, and is also solvent according to the require-

ments of this chapter and is possessed of a surplus safety invested as follows:

1. In case any such mutual company issuing policies for a cash premium without an additional contingent liability equal to or greater than the cash premium, the surplus shall be at least two hundred thousand dollars.

2. In case of any other such mutual company issuing policies for a cash premium or payment with an additional contingent liability equal to or greater than the cash premium or payment, the surplus shall be such an amount as the commissioner of insurance of Iowa may require, but in no case less than fifty thousand dollars, provided that the provisions of this section fixing a minimum surplus of fifty thousand dollars shall not apply to companies now admitted to do business in Iowa; provided, however, that no such mutual company shall be authorized to transact compensation insurance without a surplus of at least two hundred thousand dollars unless all liability for each adjusted claim in this state, the payment of any part of which is deferred for more than one year, shall be provided for by a special deposit, in a trust company of this state, which shall be a trust fund applicable solely and exclusively to the payment of the compensation benefits for which such deposit is made, or shall be reinsured in an authorized stock company, or in an authorized mutual company with a surplus of at least two hundred thousand dollars.

8974. *Copy of Application—Duty to attach.* All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which, by the terms of such policy, are made

a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy.

8975. *Failure to Attach—Effect.* The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of section 8974 it shall forever be precluded from pleading, alleging, or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option.